IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

L. H. EYLER, APPELLANT,

vs.

RICHMOND TRACTION COMPANY ET AL.,
APPELLEES.

PETITION OF APPELLANT FOR WRIT OF CERTIORARI TO U. S. CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

ROBERT STILES,
ADDISON L. HOLLADAY, } Solicitors.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

L. H. HYER, APPELLANT,

versus

RICHMOND TRACTION COMPANY ET AL.,
APPELLEES.

PETITION OF L. H. HYER FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW AND DETERMINATION, THE CASE OF L. H. HYER, APPELLANT, VERSUS RICHMOND TRACTION COMPANY ET AL., APPELLEES.

To the Honorable, the Supreme Court of the United States:

The petition of L. H. Hyer respectfully shows to this honorable court, as follows:

1. Your petitioner, a citizen of the State of Missouri, by professsion a civil engineer, in the early summer of 1895 secured from the City Council of the City of Richmond, Virginia, the grant to himself and associates, under the name and style of the Richmond Conduit Railway Company, of a franchise to build a street railway on Broad and connecting streets in said city.

2. This franchise, as finally passed, not being in all respects what your petitioner had asked, upon open conference with the Street Committee of said City Council he was assured that the desired amendments would be made

on condition that he would deposit $10,000.00 in one of the banks of the City of Richmond, Va., upon the terms and provisions of a paper to be prepared by the City Attorney, as a pledge of his intention and ability to build the road, which deposit your petitioner made, and, being thus assured of his charter, went North to see his financial backers and to prepare for the vigorous prosecution of his enterprise.

3. Arrived in New York, he was surprised to find one Phil. B. Sheild, an attorney at law of Richmond, Virginia, in conference with the parties, Messrs. Stewart & Co., Wall street brokers, who had undertaken to furnish the necessary capital for his (petitioner's) enterprise, said Sheild urging said brokers to back him and his associates, who were seeking to induce the City Council of Richmond, Virginia, to grant the franchise for the Broad street railway to them, under the name and style of the Richmond Traction Company, instead of to your petitioner and his associates, under the name and style of the Richmond Conduit Railway Company.

4. After some conference, by the advice of Messrs. Stewart & Co., who were to furnish capital for building the road as aforesaid, an amicable understanding and basis of co-operation was arrived at between the two parties represented respectively by your petitioner and said Sheild, which was embodied in a contract, in the shape of a joint letter addressed to S. H. G. Stewart, Esq., head of the house of Stewart & Co., which letter is in the following words and figures, to-wit:

"New York, August 9th, 1895.

"S. H. G. Stewart, Esq.:

"40 Wall Street, City.

"Dear Sir:

"We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement: That both of us being inter-

ested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

"It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

"Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

"Yours very respectfully,

"(Signed) L. H. HYER,

"(Signed) PHIL. B. SHEILD."

5. Your petitioner and his associates in good faith performed their part of this contract, and upon this basis the franchise was granted by the City Council of Richmond to the "Richmond Traction Company," it being understood with said Sheild, representing his Traction associates, that the names of your petitioner and two of his associates and of three from the Traction side were to be inserted in the franchise, as incorporators.

6. Said Sheild and his Traction associates, how-

ever, utterly failed to carry out their part of said contract, and, leaving out the names of petitioner and his associates, procured the grant of the franchise contemplated in said letter of August 9th, 1895, to incorporators, all of them of the Traction side, and ultimately, when petitioner demanded an explanation, in terms repudiated the obligations of the contract, denied that the Richmond Traction Company was bound thereby, and denied any and all rights of your petitioner thereunder, or in the Traction franchise and enterprise.

7. Your petitioner published the above contract of August 9, 1896, in a Richmond (Va.) newspaper before the final passage of the ordinance granting said Richmond Traction franchise to Phil. B. Sheild and others, and promptly thereafter gave, to all parties known to be interested in the Richmond Traction Company and its said franchise and enterprise, the fullest notice practicable of his rights and claims in the premises, and being met only by repeated and contemptuous denial of said rights, on the 30th day of October, 1895, he brought his bill, in the Circuit Court of the United States for the Eastern District of Virginia, at Richmond, setting forth in fuller form the above-recited facts, making an exhibit of the Traction franchise or ordinance, making parties of said Richmond Traction Company, the incorporators mentioned in said ordinance, and all other persons known to be interested in said Traction franchise and enterprise, alleging that all said parties had acted with full notice and knowlenge of petitioner's rights in the premises; that he had been unjustly deprived of said rights, and would be exposed to irreparable injury unless the court should interfere by injunction to prevent said franchise, or any part thereof, from being transferred, assigned or encumbered to or in favor of innocent parties unaffected with notice of petitioner's rights. Said bill prayed such injunction; that the court would by its decree declare him entitled to a full one-half interest in and under said contrat of August 9th, 1895, with said Sheild and associates, and, upon the basis

of said contract, entitled to a full one-half interest in said Richmond Traction Company's franchise, enterprise, property and stock; that specific execution of said contract be decreed and enforced; that all parties defendant be required to answer and to do and perform every act necessary or requisite to the vesting of petitioner's full rights in the premises, and for general relief.

8. To this bill the defendants demurred, on the ground of insufficiency and lack of equity, and that petitioner's remedy, if any, was at law.

9. Subsequently, by leave of court, petitioner filed his amended and supplemental bill, incorporating the original bill and reciting facts which had transpired since it was filed which rendered the amended bill necessary, to-wit: the subscription to stock, its issue to parties having notice of your petitioner's rights as paid-up stock without any payment whatever therefor, the organization of the Traction Company, the authorization, execution and recordation of a mortgage upon its franchise and all its property to secure $500,000 of bonds: all of which proceedings the amended bill charged to have been had and taken after full notice of petitioner's rights, as set out in his original bill, and to be, on several specified grounds, null and void as against petitioner. Said amended bill thereupon prayed for relief by injunction and the appointment of a receiver; that all proper inquiries be had and accounts taken; that, by decree of court, all said recited proceedings be declared null and void and set aside; that the franchise be disencumbered of all the burdens by said proceedings imposed upon it; and that petitioner be decreed his full rights in said disencumbered and restored franchise, and for general relief.

10. To the bill as thus amended the defendants filed their demurrer, specifying nine grounds, only two of which, however, need be noticed, for the purpose of this petition, to-wit:

(A.) That there can be no recovery upon the contract

relied upon by petitioner, the same being void as contrary to public policy.

(B.) That the remedy upon said contract, if any, is at law.

11. Upon the filing of said demurrer, your petitioner, not because he considered his said bills, fairly construed, to be defective, but because they contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making or carrying out of said contract of August 9th, 1895, filed his petition asking leave to amend his said original and amended and supplemental bills, in the manner fully and exactly set out upon the face of said petition, so that the amended paragraphs of said bills should read as therein set out. After full argument, the honorable Circuit Court, on the 6th of April, 1896, Judge Goff sitting, entered an order, from which the following is an extract:

"on consideration whereof, it is hereby ordered that said petition be filed, and that the complainant have leave to amend the said bills, in the particulars set out in his said petition, which is hereby done." (See page 66 of record.)

Your petitioner, however, for the sake of clearness, filed in the Clerk's Office of the Circuit Court, on the 18th day of April, 1896, a complete draft of his amended and supplemental bills, as the same read with all amendments allowed by the aforesaid order of April 6th, 1896, which was thereafter designated as "complainant's second amended and supplemental bill," delivering to all defendants copies of the same; and said defendants, on May 4, 1896, filed their demurrer thereto which was set down for argument, all of which was particularly set out in a preliminary decree entered by the Circuit Court on the 22nd day of August, 1896, and the same court, Judge Nathan Goff sitting, by its final decree of August 22nd, 1896, declared that the

cause came on to be heard "upon the defendants' demurrer to the complainant's second amended and supplemental bill; (that is is to say, the amended and supplemental bill as amended by the decree herein of April 6, 1896, and in the form filed on the 18th day of April, 1896)."

The last named bill contains, among others, the following allegations and statements of facts, viz:

> "Mr. Hyer agreed that the Traction ordinance should take the place of his Conduit franchise. A candid statement and explanation of this action was to be made before the Street Committee or the Council of the City of Richmond, and Sheild, acting in behalf of himself and his former associates, and also in behalf of your orator and his associates, was to apply to and secure from the Council of the City of Richmond the franchise set out in the said contract of August 9th, 1895, and your orator was to keep the $10,000.00 in Richmond until the 17th day of August, 1895, but subject to the condition set out in in the said contract."
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> * * * * * * * * *
>
> "At this same interview, said Sheild asked your orator what names of his associates should be inserted in the Traction ordinance. He insisted that he must have your orator's name, and he also desired to use the names of one or two of your orator's associates whom he specified. Your orator could not, at that moment, give definite instructions, but the next day he wired his friends in Richmond, whither Sheild had returned, desiring them to see him, and to have inserted in the Traction ordinance your orator's name and the names of two of his friends and associates who were specified. For a day or two subsequent to the signing of said contract of August 9th, 1895, said Sheild and his associates several times wired your orator as to sundry details of the joint enterprise, especially urging him, by all means, to see that the $10,000.00 on deposit in Richmond, should be detained there until the meeting of the Council—an indispensable service which your orator rendered, although not at the time having received

the telegrams referred to. And not only so, but your orator and his associates openly, publicly and fully carried out and performed each, all and every of the promises and covenants of your orator, in behalf of himself and associates, contained in said contract of August 9th, 1895."

"And your orator here takes occasion to state that he applied for and obtained leave of court to amend this, his original bill, by emphasizing the openness, publicity and fairness with which said contract was carried into effect before the City Council and its committees; not because he considered his said bill, fairly construed, as being defective in this regard, but because it contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9, 1895.

"Your orator here and now states and charges, not only that no such impression was intended to be conveyed by the bill, but that nothing approximating to it in fact occurred. On the contrary, the entire history of the Broadstreet franchise before the City Council and its committees was a matter of the utmost publicity. The original Conduit Railway franchise of your orator had been fully considered and discussed before the Council and by the business community, and the proposed amendments of it were publicly offered, considered and adopted before the Committee on Streets, and then printed; and when the Traction franchise was applied for in place of the Conduit franchise, this also was openly done before the same committee; the existence and substance of the contract of August 9th, being generally and fully known by the Council of Richmond and the public generally, and in no way concealed or suppressed, and it being also well and thoroughly understood by the Committee on Streets that the Conduit people and the Traction people had gotten together, upon the basis of this latter franchise, with the understanding that the two sides should have equal right and representation in the new company."

As petitioner views the matter, his bills, as last amended (page 81–98 of the record) *i. e.*, the bills upon which the cause was heard, do not contain a word which gives color to the suggestion that the contract upon which he relies is violative of public policy. Said bills were also amended by the insertion of a direct charge of the utter insolvency of Phil. B. Sheild, which has an evident and important bearing upon the defense that petitioner has a plain, adequate and complete remedy at law.

12. Nevertheless, substantially the same grounds of demurrer—one being added, now ten in all—were interposed to the bills in their final form (pages 114–115 of the the record).

The cause was thereupon argued and submitted, pursuant to a preliminary decree, which will be found on pages 118–119 of the record, and, on the 22nd day of August, 1896, the following final decree was entered, to-wit:

> "This cause having been argued before this court on the 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 15th days of May, 1896, upon the defendants' demurrer to the complainant's second amended and supplemental bill; (that is to say, the amended and supplemental bill as amended by the decree herein of April 6th, 1896, and in the form filed on the 18th day of April, 1896), the court filed its opinion on the 5th day of August, 1896, hereby made a part of the record, holding that the first, second and third grounds of demurrer assigned by the defendant in their said demurrer are not well taken and must be overruled; that the fourth ground of demurrer assigned in the said demurrer is well taken and must be sustained, and that having reached the conclusion last stated, the six remaining grounds of demurrer assigned by the defendants would not be considered.
>
> "Thereupon it is adjudged and decreed:
>
> "First. That the first, second and third grounds of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, to the second amended and supplemental bill filed by the com-

plainant, be, and the same are, hereby overruled.

"Second. That the fourth ground of demurrer assigned by the defendants in said demurrer filed May 4th, 1896, be and the same is hereby sustained, and all bills filed by the complainant are, for this reason, hereby dismissed, with costs to the defendant, to be taxed by the clerk; and the remaining six grounds of demurrer assigned by the defendants are not considered or determined by the court."

On the 6th day of October, 1896, an appeal was allowed your petitioner by said Circuit Court, from its said final decree, to the United States Circuit Court of Appeals for the Fourth Judicial Circuit, the assignment of errors therewith being as follows, caption and signature omitted, to-wit:

"And now, on this 6th day of October, 1896, came the petitioner, L. H. Hyer, plaintiff in the above entitled suit, by Stiles & Holladay, his solicitors, and says that the decree entered in the said cause on the 22nd day of August, 1896, dismissing all bills filed by the said L. H. Hyer in the above entitled cause, is erroneous and against the rights of the appellant, L. H. Hyer; and said petitioner, L. H. Hyer, appellant, assigns for error, and will contend, in the Appellate Court, that the court below erred as follows:

1.

"First. That the court erred in sustaining the fourth ground of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, and, for the reasons assigned in said fourth ground of demurrer, dismissing all bills filed by the complainant, L. H. Hyer. The said fourth ground of demurrer assigned by the defendants in said demurrer, filed May 4th, 1896, is in the following words and figures, to-wit:

["IV. That the contract and agreement set forth in said bill as the sole cause of action of the said complainant is against public policy,

and null and void; and no court of equity will enforce the same."

This 4th ground of demurrer will be found on page 115 of the record, and was not copied in the assignment of errors.]

"The appellant, L. H. Hyer, respectfully submits and will contend in the Appellate Court that the contract and agreement set forth in his bills filed in this cause, and referred to in said demurrer, were and are perfectly valid and lawful in all respects; that said contract and agreement are in no manner contrary to public policy; that the court below erred in holding said contract and agreement to be contrary to public policy, and therefore null and void, and erred in declining to enforce specific performance of the said contract and agreement; and erred in dismissing the bills filed by L. H. Hyer, or either of them.

2.

"Second. That the court erred in sustaining the demurrer filed by the defendants, and erred in dismissing all bills filed by the said L. H. Hyer, or either of them. The contract and agreement set out in the bills filed by the said L. H. Hyer state a plain case for relief in a court of equity; the court below should have overruled all demurrers filed by the defendants herein, and each and every ground of demurrer assigned by the defendants in their said demurrers, and should have retained jurisdiction of this suit and granted the relief prayed by the said L. H. Hyer in his said bills.

3.

"Third. That the court in dismissing the bills filed by the said L. H. Hyer in this cause, or either of them, for the reasons set out in the said decree herein of August 22nd, 1896, and the opinion of the court mentioned herein and made a part of the record; and erred in dismissing the said bills, or either of them, for any reason.

4.

"Fourth. For these and other reasons appearing upon the record of said decree of August 22nd, 1896, your petitioner prays for an appeal from and supersedeas to said decree, and that the said decree may be reviewed and reversed."

This appeal was duly perfected and prosecuted and the case was argued in the appellate court, before the Chief Justice and Judges Simonton and Brawley, and submitted at the February term, 1897; and on the 14th day of May, 1897, opinions were filed by Judges Simonton and Brawley, and the following decree of affirmance was entered by the honorable Circuit Court of Appeals:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virgina, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause, be, and the same is hereby, affirmed, without prejudice, with costs.

"It is further ordered that the mandate of the court issue after the expiration of twenty days from the date hereof."

A certified copy of the entire record of the cause in the Circuit Court of Appeals is herewith furnished as part of this application, in conformity with Rule 37 of this honorable court, and the same is marked Exhibit "A." Petitioner has made references to this record, throughout his petition, for the convenience of the court.

Of the ten grounds of demurrer interposed by the defendants to petitioner's bills, as filed April 18th, 1896, only two were dignified by notice or mention by the honorable judges of the Circuit Court of Appeals. Of the remaining eight, several were virtually abandoned by counsel in the oral argument.

Indeed, it may be said that there are but *two* real questions in the case, and that the demurrer to petitioner's bills must be overruled unless sustained upon one or other of these two grounds.

IMPORTANCE OF THE QUESTIONS.

It is not contended that both these questions are of such general interest as to require or deserve review by this great tribunal. Whether in any particular case the remedy be *at law* or *in equity* is ordinarily a question which concerns that case and its litigants only; but the PUBLIC POLICY defence presented by this record is of *very great interest and importance, at once to the general public and to the Legislative and Judicial departments of every city and State in the Union, and of the General Government as well*—and that in a double aspect, to-wit:

1ST. WHETHER IT BE NECESSARILY CONTRARY TO PUBLIC POLICY FOR RIVAL APPLICANTS FOR A LEGISLATIVE CHARTER OR FRANCHISE TO UNITE, AND AGREE TO ASK THE GRANT OF THE FRANCHISE TO THEM JOINTLY, GOING OPENLY BEFORE THE LEGISLATIVE BODY AND MAKING A FULL DISCLOSURE OF THEIR CONTRACT AND CO-OPERATION?

And if the above be answered in the affirmative, then—

2ND. WHETHER, AFTER A CONTRACT CONTRARY TO PUBLIC POLICY HAS BEEN CONSUMMATED, AND THE FRANCHISE OR OTHER BENEFIT CONTEMPLATED IN SUCH CONTRACT HAS BEEN SECURED, AND ONE PARTY HAS APPROPRIATED ALL THE BENEFIT, AND THE OTHER SEEKS JUSTICE AT THE HANDS OF THE COURT AND A FAIR DIVISION; WHETHER, WE SAY—UNDER SUCH CIRCUMSTANCES—A COURT OF EQUITY AND OF CONSCIENCE WILL ENTERTAIN AND APPROVE THE PLEA OF THE WRONG-DOER, THAT THE ORIGINAL CONTRACT WAS IMMORAL AND INVALID?

Petitioner submits that elaborate and emphatic statement can add nothing to the gravity and general interest of these great questions. It is clear beyond dispute that their importance calls for review by this honorable court, and fully justifies the issue of the writ of *certiorari* to the honorable Circuit Court of Appeals for the Fourth Judicial Circuit.

DIVERGENCE BETWEEN THE JUDGES.

But there is another ground upon which the petitioner confidently asks the issue of the writ. Especially is it desirable that questions of grave import should be reviewed by this honorable court of last resort, where there has been no harmonious or consistent decision of these questions below.

It is seldom that a record presents a more extreme instance of divergence of view by the Bench. The judges who have this far passed upon the case are Judge Goff, Senior Circuit Judge, who heard it alone in the Circuit Court, and Mr. Chief Justice Fuller, Circuit Judge Simonton and District Judge Brawley, who sat in the case upon appeal in the Circuit Court of Appeals. As above stated, the grave points in the case are two only—Public Policy and Remedy at Law.

JUDGE GOFF.

Upon the *second* of these questions, Judge Goff, in his opinion (Record, pages 116–117), says: "The third reason assigned is that the complainant has a plain, complete and adequate remedy at law, if any he has, against the defendants in the case made by the bills. I do not concur with counsel for the defendants in the argument submitted on this point, and, so far as it is concerned, the demurrer must be overruled. In my judgment, in cases of this character, where specific performance is claimed, complete and adequate remedy can only be had in a court of equity." From this decision of this point no formal appeal was taken, and little attention was paid to the point by either side in the appellate court. Indeed, petitioner's counsel questioned whether this position had not been virtually abandoned by the other side, who seemed to rest their entire case, upon appeal, upon the Public Policy defense, fortified, as it was, by Judge Goff's favorable decision. So marked was this failure to argue the jurisdictional question in the appellate court that, on the 12th day of May, 1897, but two days be-

fore the final decision of the case, a decree was entered calling for further argument upon the question whether the complainant had a plain, adequate and complete remedy at law, if any he had.

It would seem that the case finally drifted, possibly through lack of opportunity for personal conference between the judges, into a decision adverse and fatal to petitioner's rights, by concurrence upon this jurisdictional point between the Chief Justice and Judge Simonton,—without the further argument called for being had.

As hereinbefore stated, Judge Goff declared, by his two decrees of August 22, 1896, that he heard and considered the cause upon the second amended bill filed April 18, 1896, and upon the *first* question, to-wit: that of Public Policy, with some hesitation, sustained the defense and, on this ground alone, overruled the demurrer. In his written opinion he says: "While none of the cases cited are exactly similar to the one I now consider, still many of them have points in common with it, and the reasoning of the courts in the able opinions referred to, by which the rule of law mentioned has now been well established, includes in my judgment, contracts of the character set up and relied upon by the complainant. I think that the contract, the specific performance of which is the object of this suit, the intention of which was to withdraw competition from before the City Council of the City of Richmond, is void, because against Public Policy, and I shall, therefore, decline to enforce the same." But, later in his opinion, the learned Judge makes this statement: "This case involves questions of great importance not only to the complainant, but to the country at large, and its early decision by the court of last resort is desirable, not only because of the interest of the parties to the controversy, but also because the public is concerned in the early and proper adjustment of the same."

JUDGE SIMONTON.

As above noted in Judge Goff's decree (pages 119-120 of the record), this cause was heard by him "upon the defendants' demurrer to the complainant's second amended and supplemental bill; (that is to say, the amended and supplemental bill as amended by the decree herein of April 6th, 1896, and in the form filed on the 18th day of April, 1896);" yet Judge Simonton, while affirming Judge Goff upon the public policy defense, evidently bases his opinion upon the complainant's original bill before amendment; for he not only refers to the defendants' demurrer "setting forth nine grounds of demurrer," which was the demurrer filed prior to last amendment, but, to sustain his views that the contract between Hyer and Sheild involved features contrary to public policy, quotes from the bill as it stood prior to said amendment, *i. e.*, he quotes from said bill clauses and expressions which had been stricken there. from under Judge Goff's decree of April 6th, 1896, and which are not to be found in the second amended and supplemental bill filed April 18, 1896, upon which Judge Goff heard and decided the cause.

JUDGE BRAWLEY.

Judge Brawley dissented, in a very vigorous opinion from which we make the following extracts:

"BRAWLEY, District Judge:

"I dissent. Hyer and Shield were rival promoters, each seeking from the City Council of Richmond a franchise for a street railway on Broad street, and both looked to Stewart, a banker in New York, for the money to carry out the enterprise.

"Hyer had already obtained a franchise from the Council, and was asking for some amendments thereto. Stewart, fearing that the continued rivalry might result in the defeat of both or in the obtaining of a franchise of such nature that capital would not embark in it, advised the

parties to come together, and they united in an agreement for mutual co-operation and for an equal division of whatever profits were realized. The agreement does not on its face bear any of the *indicia* which mark a dishonest purpose. It does not show, nor can it be reasonably inferred, that any sinister, extraneous or corrupting influences were to be brought to bear upon the City Council of Richmond to superinduce the granting of the franchise, nor is it alleged that any improper means were to be used to accomplish it, and thus it is clearly distinguished from all that class of cases where the courts have held contracts void as reeking with corruption, such as using official influence for private gain, securing public office for pay, retiring from competitive candidacy under agreements to divide fees, securing public contracts upon like terms, or bargains for lobbying services to influence legislation. None of those elements enter here, and the sole ground upon which the decision rests is that the agreement was calculated to diminish competition for the obtaining of the franchise."

* * * * * * * * * *

"That Hyer and Shield had made this agreement was no secret. The fact was published in the newspapers in Richmond on the afternoon before the City Council passed the ordinance granting the franchise, and we have no complaint from that city, from the party supposed to be injuriously affected, that the suppression of competition has induced the granting of a franchise not duly regardful of the public interests. The bill states that it was Hyer's intention to lay the whole matter of this agreement before the City Council, and there is no ground for the suspicion that there was any concealment. I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp* vs. *Taylor* and approved in *McBlair* vs. *Gibbes* and *Brooks* vs. *Martin*, and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable. Here the contract to obtain the fran-

chise which is held to be illegal has been consummated, the franchise has been obtained, the aid of the court is not sought to enforce it nor can the franchise be in any manner affected by what it may do; the transaction alleged to be illegal is completed and closed, one of the parties is in possession of all the fruits and the other seems to me to be entitled to recover in an appropriate action his share of the realized profits.

"Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the City of Richmond to vacate the charter on the ground that it was obtained by any corrupt practices or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters, but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract of his own seeking on the ground that it was immoral, and, therefore, that he has the right to make off with the swag."

THE CHIEF JUSTICE.

The Chief Justice filed no written opinion. It is stated at the bottom of Judge Simonton's opinion that "The Chief Justice concurred in the result, on the ground that the remedy of the complainant, if any, was at law."

Evidently, then, the Chief Justice did *not* concur in Judge Simonton's opinion upon the question of public policy; and, as Judge Simonton informed counsel on both sides, at the time of its entry, that the decree of May 12th, 1897, calling for further argument upon the question of "remedy at law" was entered at the wish of the Chief Justice, the case would seem not to have received a very conclusive settlement; and yet it is clear that your petitioner is remediless, the decision thus rendered against him being final and fatal to his rights, unless this honorable court issue its writ of *certiorari* to the Honorable Circuit Court of Appeals, as in this petition prayed.

Errors Complained Of.

Petitioner is advised and complains that the decree of the honorable circuit court of the 22d day of August, 1896, is erroneous for the reasons set forth in his assignment of errors in that court, hereinbefore recited, and that the decree of the honorable circuit court of appeals of the 14th day of May, 1897, is erroneous, in that it affirmed said decree of the circuit court, and also because it affirmed said decree upon a ground which is itself error, to wit, that "the remedy of the complainant, if any he has, is plain, adequate, and complete at law."

Your petitioner now respectfully submits that at least one of the questions involved in his cause and stated in his petition is of sufficiently "general interest and importance" and sufficiently "open to controversy" to justify the issue of the writ of *certiorari*, and should be authoritatively and finally adjudged by this honorable court upon and after full presentation to the court of the merits of the said question and of petitioner's cause by both parties to the controversy.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States circuit court of appeals for the fourth circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the cause therein entitled L. H. Hyer, appellant, *versus* The Richmond Traction Company *et al.*, appellees, No. 198, to the end that the said cause may be reviewed and determined by this court, as provided by law; that the decree of the said circuit court of appeals in the said cause, entered on the 14th day of May, 1897, affirming the decree of the circuit court of the United States for the eastern district of Virginia, entered August 22d, 1896, sustaining the defendants' de-

murrer to the complainant's bills and dismissing said bills with costs, be reversed and annulled; that the said demurrer be overruled and the cause remanded to the circuit court of the United States for the eastern district of Virginia for further proceedings therein according to law, and that petitioner may have such other, further, general and complete relief in the premises as may be agreeable to equity and to this court may seem appropriate.

And your petitioner, as in duty bound, will ever pray, &c.

L. H. HYER.

ROBERT STILES, *Solicitor.*

"DISTRICT OF COLUMBIA, }
"*City of Washington*, } *ss:*

"Before the undersigned, a notary public in and for the District of Columbia, appeared L. H. Hyer, who, being duly sworn, says that he is the L. H. Hyer who is the petitioner in the above petition, whose name is signed thereto and to this affidavit, and the party complainant and appellant in the litigation in the circuit court of the United States for the eastern district of Virginia, and in the United States circuit court of appeals for the fourth judicial circuit, in said petition referred to; that he read the said petition before subscribing the same, and that the facts therein stated are true to the best of his knowledge, information, and belief.

"L. H. HYER.

"Sworn to and subscribed before me this 22d day of May, 1897.

"JAMES D. MAHER,
[SEAL.] "*Notary Public.*"